

ered as equally available; nor could any one ascertain, from a view of the books and proceedings of either the principal or assistant surveyor alone, whether any other person had already entered a warrant to affect the land he wished to obtain.

I am therefore, satisfied, that although every survey must be dated on the day on which it was actually made; yet, in this instance, the survey of Clara Fisher, having been improvidently and erroneously made by the assistant, before the warrant had been lodged with and properly noted by the principal surveyor in * his book, must be considered as void and unavailable as against all special entries and surveys made regularly and **261** *bona fide* before that time. *Wilson v. Mason*, 1 *Cran.* 100.

But these regulations, made, in this respect, with the avowed intention of preventing disputes, ought not to be allowed to be so applied as, in any manner, to work that very mischief they were designed to prevent. Equity will not suffer any rule or legislative enactment, however positive, to be itself perverted into an instrument of fraud; or to be so used as to give any one, not ignorant of the facts and the bearing of the rule, an unjust and unfair advantage. The great Statute of Frauds itself is always so construed and applied as to prevent its being used as the means and cover of fraud. *Mestaer v. Gillespie*, 11 *Ves.* 627; *Fermor's Case*, 3 *Co.* 77.

The intention of these rules is to give a right of pre-emption to him who should first, in the manner prescribed, designate the land he proposed to purchase. The claimant of Clara Fisher had proceeded erroneously; and, because of that error, his right of pre-emption would, as against all other *bona fide* purchasers, be postponed from the 25th to the 29th of May. But, on seeing the exact sameness of the surveyor's description of River's Bend, the location of which was made in the surveyor's book on the 28th of May, with that of Clara Fisher, it seems to be difficult to resist the conviction, that the claimant of River's Bend, was fully apprised of the previous survey of Clara Fisher; that he availed himself of the information it afforded, and designed to take an unfair advantage of the erroneous manner in which it had been made. Under such circumstances, to give the certificate of River's Bend a priority over that of Clara Fisher, would be to make these rules themselves the instruments of fraud. It would be like allowing a subsequent purchaser, with full notice, to avail himself of a defect in a conveyance, or of the Statute of Frauds in opposition to a fair, equitable, and known right; which would be contrary to all the principles of equity in this respect, and has never been permitted in any case whatever. (b)

(b) SEWARD v. HICKS, 1718.—It appearing to the Court, that George Seward had a warrant from the late Lord Proprietary,—that Thomas Smithson, upon